No. 93-632

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ANTARES AIRCRAFT, L.P.,

Petitioner,

—against—

FEDERAL REPUBLIC OF NIGERIA and
NIGERIAN AIRPORTS AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the federal court jurisdiction to redress wrongful acts of a foreign sovereign which "cause a direct effect in the United States" within the meaning of Section 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, be confined to claims for breach of contract and exclude from its coverage intentional tortious misappropriation abroad of assets owned by a U.S. firm?

2. In business tort cases, should the bright line test of location of the business of the injured party used in *Republic of Argentina v. Weltover*, ____ U.S. ____, 112 S. Ct. 2160 (1992), to determine "direct effect" within the meaning of that aforesaid section be replaced by a "foreseeability" or "legally significant acts" analysis?

PARTIES

Petitioner is Antares Aircraft, L.P., a limited partnership located in New York.

Respondents are the Federal Republic of Nigeria and Nigerian Airports Authority. The Federal Republic of Nigeria is a foreign sovereign under the terms of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* The Nigerian Airports Authority is an instrumentality of the Federal Republic of Nigeria, and is therefore considered a foreign sovereign for the purposes of FSIA.

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In The

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ANTARES AIRCRAFT, L.P.,

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-against-

FEDERAL REPUBLIC OF NIGERIA and NIGERIAN AIRPORTS AUTHORITY,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Petition for a Writ of Certiorari

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

REPORTING OF OPINIONS IN THE CASE

The opinion of the District Court dismissing Antares' complaint dated February 26, 1991, has not been published in an official or unofficial reporter. The text of that opinion is set forth in Appendix F to this Petition.

The opinion of the Second Circuit dated October 28, 1991, affirming the complaint's dismissal is published at 948 F.2d 90 (2d Cir. 1991). The text of that opinion ("*Antares I*") is set forth in Appendix D to this Petition.

The order of the Supreme Court, dated June 29, 1992, vacating and remanding the Second Circuit's decision for further consideration is published only in an unofficial reporter, at 112 S. Ct. 3020 (1992). The text of that order is set forth in Appendix C to this Petition.

The opinion of the Second Circuit dated July 21, 1993, reaffirming the complaint's dismissal on remand is published at 999 F.2d 333 (2d Cir. 1993). The text of that opinion ("*Antares II*") is set forth in Appendix A to this Petition.

STATEMENT OF JURISDICTION

Antares seeks review of a judgment of the United States Court of Appeals for the Second Circuit in *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993) (Appendix A). Jurisdiction is based upon 28 U.S.C. § 1254.

STATUTE INVOLVED

The following statute is involved in this Petition:

Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) and § 1605(a)(3), which provides, in relevant part, that

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -- . . .
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . . [and]
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; . . .

PRELIMINARY STATEMENT

Petitioner Antares Aircraft, L.P. ("Antares") respectfully requests that a writ of certiorari be granted in this case to review and reverse a majority opinion of a panel of the United States Court of Appeals for the Second Circuit dated July 21, 1993 and published at 999 F.2d 33 ("*Antares II*"). That opinion issued a year after this Court vacated the Second Circuit panel's prior decision in this case, published at 948 F.2d 90 ("*Antares I*"), and remanded for further consideration in light of *Republic of Argentina v. Weltover, Inc.*, ____ U.S. ____, 112 S.Ct. 2160 (1992). *Antares II* limits the scope of *Weltover* to contract claims, and thus adheres to the panel's earlier decision in *Antares I*, which affirmed a dismissal by the District Court (S.D.N.Y. 1991) of Antares' complaint against the Federal Republic of Nigeria ("FRN") and one of its instrumentalities, the Nigerian Airports Authority ("NAA"), on the basis of lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1602 *et seq.*).

This case presents an issue of critical importance to the protection of U.S. businesses in their conduct of commercial activities overseas. In *Antares I*, the Second Circuit found that the misappropriation commmitted here "undoubtedly" caused Antares, a U.S. firm, to suffer a "direct effect". 948 F.2d at 95. Yet, in *Antares II*, it proceeded to rule that a U.S. company is limited to the courts of a foreign country for redress when that foreign country misappropriates the company's assets, even though the wrongful acts done in the foreign country cause a direct effect to a U.S. firm, as long as the action sounds in fraud or conversion.

To hold otherwise, according to the Second Circuit, would produce the following result:

> Many commercial disputes, like the present one, can be pled as the torts of conversion or fraud and would, if appellant is correct, result in litigation concerning events with no connection

> with the United States other than the citizenship or place of incorporation of the plaintiff.

Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d at 36.

In most instances, such a ruling effectively strips U.S. businesses of any meaningful protection against unlawful seizures of their business assets. That is why all other circuit and district courts that have considered the issue have reached contrary conclusions.

There is no rational explanation for refusing to hold that the direct financial injury to a U.S. business caused by a foreign sovereign's wrongful commercial "conversion or fraud" directed at a U.S. business, constitutes a "direct effect in the United States" within the meaning of the FSIA's "commercial activity" exception to sovereign immunity, 28 U.S.C. § 1605(a)(2). Certainly nothing in the construction given in *Weltover* to the "direct effect" clause even remotely hints of such a restriction. The fear expressed in *Antares II* that to hold otherwise would permit suits in the U.S. for personal injuries is unrealistic. It fails to realize that such wrongs are not "commercial activities" and inexplicably ignores this Court's ruling in *Saudi Arabia v. Nelson*, ____ U.S. ____, 113 S. Ct. 1471 (1993), that such personal injuries are not "commercial in character."

Further, the ruling conflicts with every other circuit that has considered the question of where a U.S. concern suffers a commercial injury. Those circuits have held that financial harm incurred by a U.S. concern qualifies as a direct effect in the U.S. for purposes of the FSIA. Thus, the D.C. Circuit found subject matter jurisdiction under the FSIA where the plaintiff, a U.S. concern, suffered financial injury in the U.S. due to a foreign sovereign's wrongful conduct overseas. *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985). The Fifth, Sixth and Eleventh Circuits all agree with the D.C. Circuit: a U.S. concern suffers direct economic injury in the U.S. even if the origin of the injury is overseas.

Antares II sends a signal to foreign governments that the law of this country is in disarray on the critical issue of subject matter jurisdiction over disputes arising out of their commercial mistreatment of U.S. firms. It should not be allowed to stand.

STATEMENT OF FACTS

The facts pleaded in this action set forth a deliberate scheme, successfully carried out by NAA and FRN, to wrongfully retain in Nigeria a commercial aircraft (the "Aircraft") for the purpose of extracting United States funds from Antares, a New York-based limited partnership whose sole asset was the Aircraft. In January 1989, NAA physically possessed the Aircraft, preventing it from being moved from the tarmac of a Lagos, Nigeria airport, under the pretense that Antares' former lessee, Gam Air, owed certain parking fees. Yet, no matter what steps Antares took to relieve this alleged debt not owed by it, NAA found excuse after excuse to continue holding the Aircraft.

First, Antares obtained orders from both the High Court of Nigeria, Lagos State, Ikeja Division, and from the United States District Court for the Southern District of New York declaring that Antares owned the Aircraft free and clear of Gam Air's debts. But NAA refused to release the Aircraft. Faced with the rapid deterioration of its sole asset due to the corrosive weather conditions on the African West Coast and threats of destruction of the Aircraft, Antares acceded to NAA's demands and paid the sums allegedly owed to free the Aircraft. But each time Antares paid the "fees," NAA declared new fees were owing.

Only one affiant with knowledge of the underlying facts gave testimony, J. Nelson Happy, Esq.[1] His affirmation detailed the

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[1] Mr. Happy is an American attorney who travelled to Nigeria on Antares' behalf after the Nigerian authorities took possession of the Aircraft, and remained there until it was finally permitted to depart.

deliberate course of the NAA to obtain U.S. funds from Antares by temporarily expropriating the Aircraft. NAA and FRN accomplished this in classic extortionate style -- demanding sums of money to permit the Aircraft to leave Lagos, Nigeria, only to announce new demands once payments were made.

The scheme was carried out over a course of five months and was resolved ultimately by Antares' arranging for a final "final" payment, which was held in escrow in Nigeria until the Aircraft flew off in late May 1989. By that time, Antares had paid more than $100,000 in "fees," and its Aircraft had suffered substantial damage from corrosion and vandalism.

Antares subsequently commenced this action. Although NAA and FRN purported not to deny the factual basis of the action, they moved to dismiss on jurisdictional grounds that asserted a different set of facts. In support of their motions, the NAA submitted conclusory affidavits from individuals who lacked personal knowledge of the events. Nevertheless, they did not contest Antares' allegations as to NAA's wrongful conduct.

The district court relied on the NAA affidavit submitted by one of its "legal advisors", W.C. Madueke, and dismissed Antares' complaint on the ground that it lacked subject matter jurisdiction over both FRN and NAA. On appeal, *Antares I*, affirmed the district court's decision. The decision held, in relevant part, that financial injury incurred in the United States by a United States partnership from conduct committed overseas is not a "direct effect in the United States" pursuant to 28 U.S.C. § 1605(a)(2).

Upon review, this Court granted certiorari, vacated and remanded for reconsideration in light of its decision in *Republic of Argentina v. Weltover, Inc.*, ____ U.S. ____, 112 S. Ct. 2160 (1992). On remand, in the Second Circuit, over the dissent of the judge who wrote the opinion in *Antares I*, reaffirmed its prior ruling upholding dismissal of the complaint.

The Second Circuit's ruling in *Antares II* eviscerates the prin-

ciples set forth by this Court in *Weltover*, limiting them to claims for breaches of contract, and directly conflicts with decisions of other circuits. This Court should grant a writ of certiorari to correct the Second Circuit's erroneous decision.

ARGUMENT

The Restriction Engrafted onto the Commercial Activity Clause of the FSIA Excluding Direct Effects Caused by Conversion or Fraud Violates the Construction Given to that Clause in *Weltover*, Conflicts with Rulings of Other Circuits and is an Unsound Abridgement of the Protection Afforded U.S. Companies Under International Law

The "commercial activity" exception to the FSIA provides:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case -- . . .
>
> (2) in which the action is based . . . upon an act outside the territory of the United States in contention with a commercial activity of the foreign state elsewhere and *that act causes a direct effect in the United States*;

28 U.S.C. § 1605(a)(2) (emphasis supplied).

The Second Circuit's opinion in *Antares I* recognized that Antares "undoubtedly" suffered a "direct effect" as a result of defendants' activities, but ruled that it did not take place in the United States. 948 F.2d at 95. *Antares I* also recognized that Antares suffered a financial injury in the United States as a result of defendants' conduct. *Id.* However, the opinion concluded that the direct effect did not occur "in the United States" because the "legally significant acts giving rise to the claim" took place in Nigeria. *Id.*

This Court vacated and remanded *Antares I* for reconsideration in light of *Republic of Argentina v. Weltover*, ____ U.S. ____, 112 S.Ct. 2160 (1992). After a delay of more than a year, a two-judge majority of the panel issued *Antares II* reaffirming its prior ruling

based on the same "legally significant acts" analysis. Judge Altimari, the author of *Antares I*, dissented from that analysis and the majority's holding.

This Court should review the ruling in *Antares II* because its exclusion of commercial damage to a U.S. firm caused by conversion or fraud from qualifying as a "direct effect in the United States" severely undermines this Court's decision in *Republic of Argentina v. Weltover, Inc., supra*. Further, the ruling in *Antares II* conflicts directly with the rulings of four other Courts of Appeals, and every other appellate panel and every district court in the Second Circuit that has considered the issue of whether a U.S. business incurs a "direct effect in the United States" when it is subjected to commercial abuse by a foreign sovereign.

A. The Opinion Violates Principles Set Forth in this Court's *Weltover* Decision and the Second Circuit Opion it Affirmed

In its order vacating the Second Circuit's prior decision in this case, this Court remanded for reconsideration "in light of *Republic of Argentina v. Weltover, Inc.*, 504 U.S. ____, 112 S. Ct. 2160, ___ L.Ed.2d ___ (1992)." 112 S. Ct. 3020 (1992). Nevertheless, in *Antares II*, the Second Circuit failed to apply the principles outlined in *Weltover*. Instead, *Antares II* utilized a "legally significant acts" standard for gauging whether plaintiff had suffered a "direct effect in the United States." Notwithstanding the lip service paid to the *Weltover* decisions, the court's analysis actually tested not the location and directness of the effect, but rather whether U.S. subject matter jurisdiction was "foreseeable" to the Nigerians -- an approach specifically rejected and criticized by this Court in *Weltover*.

At issue in *Weltover* was the Argentine government's unilateral rescheduling of payments on certain bonds ("Bonods") at the time they became due and payable. Plaintiff-respondents, two

Panamanian corporations and a Swiss bank together holding more than $1 million worth of Bonods, insisted on timely payment, and, as permitted under the terms of the bonds, designated New York as the place of payment. When the demand was refused, they brought suit in the Southern District of New York. 112 S. Ct. at 2164.

The matter eventually came before this Court upon review of the Second Circuit's holding that the foreign entities had sustained a "direct effect in the United States" sufficient to confer jurisdiction under the FSIA. After concluding that the issuance of the Bonods did in fact qualify as a "commercial activity" under § 1605(a)(2) of the Act, the court construed the "direct effect" clause. It rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability'," *id.* at 2168, thereby resolving a long-standing split among the circuits. Instead, the court stated, "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's ... activity'." *Id.* (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), *aff'd sub nom., Republic of Argentina v. Weltover*, ____ U.S.____, 112 S. Ct. 2160 (1992)).

This said, the court held, with "little difficulty," that the rescheduling of the maturities of the Bonods had a "direct effect" on the bondholders. *Id.* In support of this conclusion, the court noted that the bondholders had designated New York as the place of payment and that Argentina had made some interest payments in New York before rescheduling the payments. *Id.*

The test formulated by the Second Circuit in *Weltover* and quoted with approval by this Court as the proper standard for "direct effect" analysis (whether the effect "follows 'as an immediate consequence of defendant's ... activity'") was simply ignored in *Antares II*. The full quotation of that test is as follows:

> Where the plaintiff is a corporation, "the relevant inquiry under the direct effect clause . . . is whether the corporation has suffered a 'direct' financial loss." *Texas Trading [&*

> *Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir.), *cert. denied*, 454 U.S. 1148 (1982)]. For the financial loss to be "direct," the corporate entity must itself be placed in financial peril as an immediate consequence of the defendant's unlawful activity. [citation omitted]

Weltover, Inc. v. Republic of Argentina, 941 F.2d at 152.

It cannot be gainsaid that Antares -- which faced a Hobson's choice between permanently losing its sole asset, the Aircraft, and paying off the Nigerian defendants -- was "placed in financial peril as an immediate consequence" of the defendants' activity. Further, with respect to the location of financial effects, both this Court's and the Second Circuit's *Weltover* opinions endorsed another bedrock principle set forth in *Texas Trading* -- namely, that a "direct effect" of harm to a business is incurred where that business is located: "[c]learly, a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business." 941 F.2d at 152.

This Court's endorsement of these elements of the Second Circuit *Weltover* opinion is further demonstrated by this Court's reliance on *Texas Trading* -- *Weltover's* progenitor -- in rejecting the "substantial and foreseeable" requirement. 112 S. Ct. at 2168. Long recognized as the leading Second Circuit decision interpreting the FSIA, *Texas Trading* premised its analysis of the FSIA's commercial activities exception on the reality that, unlike individuals, commercial entities "can only suffer financial loss." 647 F.2d at 312.

Antares II simply jettisoned without discussion the principles articulated both by those decisions, and even *Antares I* itself. *Antares I* found that Antares had "undoubtedly" suffered a "direct effect" as a result of defendants' activities. 948 F.2d at 95. Yet *Antares II* contained no acknowledgment that Antares, as a U.S. business, necessarily had suffered such an effect. It made the

Delphic pronouncement that "the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice" to confer jurisdiction. 999 F.2d at 36. Further, no effort was made to determine whether the financial effect sustained by Antares was "direct" -- *i.e.*, whether the company was placed "in financial peril as an immediate consequence of the [Nigerian] defendant[s'] ... activity." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d at 152.

This omission provoked Judge Altimari -- who had authored *Antares I* -- to enter a strong dissent:

> Obviously corporations and limited partnerships are not natural persons, and consequently can only suffer financial rather than physical injuries. As noted above, in *Weltover* [the Second Circuit] concluded that these financial injuries are directly felt where a firm was organized or where its principal place of business is located. . . . Accordingly, upon further reflection in light of the Supreme Court's affirmance of our decision in *Weltover* and its subsequent remand of the instant case in light of *Weltover*, I conclude that the American partnership suffered a direct effect in the United States within the meaning of §1605(a)(2) of the Foreign Sovereign Immunities Act.

999 F.2d at 37 (Altimari, J., dissenting).

Eschewing the principles set forth in the two *Weltover* decisions, the two-judge majority in *Antares II* resurrected the result-oriented "legally significant acts" analysis focusing on the fact that the dealings between Antares and the NAA/FRN took place in Nigeria. 999 F.2d at 36. Plainly, this approach was irrelevant to the nature and location of the "effect" upon Antares. It not only ignored the point that the location of the dealings between the parties rather goes to the state of mind of the Nigerian entities -- *i.e.*, to the "foreseeability" of being subject to U.S. jurisdiction -- but treated the fact that the tort was directed at a U.S. firm to obtain U.S. dollars as purely fortuitous.

Thus, in ignoring the "directness" of the effect inflicted on a U.S. firm, *Antares II* rejected Antares' argument that the payment of funds from a U.S. bank in response to defendants' extortionate demands was of substantial legal significance, stating:

> The Nigerian authorities were indifferent to the geographic location of the source of the money used to pay the fees. Their demands would have been satisfied had Antares paid from a London checking account or borrowed the funds from a bank in Lagos.

999 F.2d at 36.

This Court's decision in *Weltover* does not turn on the expectations or preferences of the wrongdoing sovereign.[2] The proper approach under *Weltover* is to determine whether financial peril to the injured business followed "as an immediate consequence of the defendant's activity." 112 S. Ct. at 2168. Plainly, since the only way to recover the Aircraft was to pay what the Nigerians demanded, Antares was placed in such "financial peril."

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[2] Further, to the extent that the NAA and FRN's geographical perspective could be deemed relevant, it was improper for the Second Circuit to cavalierly reject Antares' allegation that the Nigerian authorities were well aware that they were dealing with an American entity. Throughout the five-month period when the Aircraft was being held, Antares was represented in Lagos by an American attorney, Mr. Happy, who had travelled there soon after the scheme began to unfold. Moreover, during the "negotiations" Antares went into the Nigerian courts, identifying itself as an American business entity. It obtained orders from the Nigerian and U.S. courts stating that it owned the Aircraft free and clear of the alleged debts for "parking fees." It showed those orders to the NAA in its efforts to get this Aircraft released. Finally, in both of its two decisions in this litigation the Second Circuit has failed to credit Antares' allegation that the Nigerian defendants expressly directed that moneys be deposited in a specific California bank account as part of the payment transaction.

But *Antares II* made no such inquiry. Instead, in finding no jurisdiction, *Antares II* resurrected the discredited "substantial and foreseeable" test only a year after it was definitively rejected by this Court. Indeed, *Antares II* cited as support for its ruling two cases specifically noted in *Weltover* as examples of the rejected "substantial and foreseeable" approach, *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985). 999 F.2d at 36. Clearly, the Second Circuit was ignoring the Court's rejection of this test in *Weltover*.

The result in *Antares II* appears to be driven by a concern that if Antares' claim was permitted to go forward, commercial claims against foreign sovereigns could henceforth be framed as torts, "result[ing] in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff." 999 F.2d at 36. This concern is not only irrelevant, but puzzling. Even under the restrictive construction given to *Weltover* by *Antares II*, a breach of contract claim by a U.S. firm would cause a direct effect in the United States. Why would the injured promisee wish to plead such a claim as a tort? Simply put, artful pleading is a non-issue.

Antares II also expressed alarm at the possibility that personal injury actions by U.S. citizens injured abroad would become subject to U.S. jurisdiction. 999 F.2d at 36-37. This, too, is "a bit of a *non sequitur*," *Weltover*, 112 S. Ct. at 2168 (quoting *Texas Trading*, 647 F.2d at 311), since this Court had specifically shut off that possibility prior to the issuance of the decision in *Antares II*. *Saudi Arabia v. Nelson*, ____ U.S.____, 113 S. Ct. 1471 (1993).

More importantly, the court's policy rationale does violence to Congressional intent with regard to the FSIA. The legislative history makes clear that Congress' primary purpose in enacting the FSIA was to allow American business people and companies to have access to U.S. courts to resolve business disputes with foreign sovereigns. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19

(1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. (1976) at 24-25.

Further, by purporting to draw a bright line between claims for business torts and those for contract breaches, *Antares II* has resurrected pleading niceties bearing no relation to reality. Under its rationale, there would be FSIA jurisdiction where a foreign sovereign breaches a contract calling for the payment of money to a U.S. concern, but none where a foreign sovereign commits a business tort -- as in the instant litigation -- by extorting the same amount of money from the U.S. bank account of the same U.S. business.

It is unimaginable that Congress intended the protections under international law afforded by the FSIA, to hinge on such artificial technicalities. Certainly nothing in *Weltover* authorizes such an approach.

B. The Opinion Creates a Conflict with Every Other Circuit in Holding that a U.S. Concern Harmed Overseas Does Not Experience a "Direct Effect in the United States"

Other than the opinions in *Antares I* and *II*, every circuit that has confronted the issue has held that a U.S. concern purposefully harmed overseas by a sovereign engaged in commercial activity does sustain a "direct effect in the United States." The Second Circuit in *Antares II* flatly rejected this approach, thereby creating a direct conflict among the circuits that can be resolved only upon this Court's review.

In a case with remarkable factual similarities to this one, *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), the Court of Appeals for the District of Columbia held that a financial injury arising out of a foreign

sovereign's detention of a ship at its port was a "direct effect in the United States" sufficient to confer jurisdiction. There, as here, it was alleged that the foreign sovereign demanded payment to be made to a specific bank account in the U.S. Yet, in *Transamerican Steamship* the D.C. Circuit found jurisdiction over the foreign sovereign because, even though the relevant misconduct occurred outside the United States, U.S. banking resources were used and the plaintiff experienced foreseeable financial injury in the United States. *Id.* at 1004.

Likewise, the Fifth, Sixth and Eleventh Circuits have recognized that a U.S. business sustaining a purposefully inflicted injury abroad experiences a "direct effect in the United States." In *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit expressly found jurisdiction over a foreign sovereign under the FSIA based on financial injury to U.S. citizens residing and conducting business within the U.S. *Callejo* involved a Mexican-owned bank that had breached explicit conditions of certain certificates of deposit in order to comply with regulations newly promulgated by the Mexican government mandating that all deposits in Mexican banks must be repaid in Mexican pesos. The plaintiffs, U.S. citizens, had purchased the certificates that called for payment of principal and interest in U.S. dollars. Significantly, the court dismissed as irrelevant whether the contract called for payment to the plaintiffs in Mexico or the U.S., stating that "[s]ince the Callejos were located *in the United States*, the effects of Bancomer's breach were inevitably felt by them there." *Id.* at 112 (emphasis supplied).[3]

Similarly, in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), the Sixth Circuit embraced the concept that financial injury to a U.S. business supports FSIA jurisdiction. *Gould* is among the very few cases that, like Antares' lawsuit,

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[3] In spite of its express finding of FSIA jurisdiction, the Fifth Circuit held that the suit was barred by the act of state doctrine because it called into question the validity of Mexico's exchange control regulations. Such a defense is not at issue here.

involves allegations of intentional commercial torts abroad by foreign sovereign instrumentalities. The case concerned misappropriation of trade secrets by French companies, which had indirectly utilized those secrets through a joint venture with a Japanese company. *Id.* at 453. Thus -- as was the case in FRN and NAA's extortion from Antares -- the relevant wrongful acts alleged had taken place outside this country. Nevertheless, the *Gould* court resoundingly rejected defendants' contentions that corporate domicile in the U.S. cannot serve as a sufficient basis for a finding that a commercial activity outside the U.S. has a direct effect in the U.S. After noting that the U.S. concern would suffer financial loss in the U.S. based on the foreign sovereign's conduct abroad, the court responded:

> Surely, this is the kind of claim which Congress intended district courts to adjudicate when brought by American nationals against foreign sovereigns; it is unlikely that Congress intended to create havens abroad for thieves of this country's industrial secrets.

Id.

Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344 (11th Cir. 1982), like *Gould* and the *Antares* litigation, also involved a wrongful taking *from* the U.S., rather than a failure to pay money *into* the U.S. There, the Eleventh Circuit considered whether a wrongful demand for payment by a foreign entity under a letter of credit guaranteeing performance by an American corporation caused a "direct effect in the United States." The court held that it met the jurisdictional standard:

> [t]he letter of credit arrangement -- which was structured according to the wishes of the [defendant Iranian entity] -- extends into this country, and the appellants' demands thus have significant, foreseeable financial consequences here.

Id. at 1351.

Cases decided since this Court handed down the *Weltover* decision widen the split with the Second Circuit. In *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375 (5th Cir. 1992), the Fifth Circuit found jurisdiction under § 1605(a)(2) based on a much more attenuated chain of causation than was present in the instant litigation. There, plaintiff sustained financial harm because the Government of the Philippines, after selling an airplane to plaintiff, refused to defend an action in Arkansas challenging plaintiff's title. Relying on *Weltover*, the Fifth Circuit held that the legal expenses subsequently incurred by plaintiff in defending the Arkansas title action provided the requisite "direct effect in the United States," notwithstanding that the plane was sold in the Philippines and thereafter moved to the U.S. by the plaintiff. *Id.* at 1387.

Similarly, in *Ampac Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973 (S.D. Fla. 1992), the District Court, relying on *Weltover*, found "direct effect" jurisdiction based on allegations that defendants' fraud and breaches of a contract made in Honduras "caused [plaintiff] to expend substantial sums of money, incur substantial costs and charges, suffer injury to its business reputation and lose substantial profits in Miami. . . ." *Id.* at 977. *See also McKesson Corp. v. Islamic Republic of Iran*, No. 82-0220, 1993 U.S. Dist. LEXIS 11792 at *73-78 (D.D.C. August 23, 1993) (finding "direct effect" where American corporation frozen out of enterprises in Iran, resulting in discontinuance of dividends and cessation of trade).

The difference between the strong business-oriented pro-jurisdiction holdings of *Gould, Harris, Fuller Aircraft* and *Ampac Group*, on the one hand, and that of the Second Circuit in *Antares II*, on the other, reveals the depth of the philosophical schism inherent in this conflict among the circuits over the meaning of the phrase "direct effect in the United States" in 1605(a)(2). Thus, if a U.S. business harmed overseas by the tortious acts of a foreign sovereign were to seek relief in the D.C., Fifth, Sixth or

Eleventh Circuits, as opposed to the Second Circuit, it would likely be able to have its day in court.

Failure to resolve this conflict will result in circuit forum shopping reminiscent of that in the area of patent law prior to the creation of the Federal Circuit. For the sake of both American businesses operating in the international arena and the foreign sovereigns transacting with them, this Court's intervention is appropriate. *See Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algevienne de Navigation*, 730 F.2d 195, 203, *reh'g denied*, 734 F.2d 1479 (5th Cir. 1984) ("for obvious reasons, it is highly desirable to avoid circuit conflicts in the sensitive area of sovereign immunity").

C. The Opinions in *Antares I* and *II* Conflict with Other Second Circuit Rulings

Apart from *Antares I* and *II*, every other decision in the Second Circuit to consider the question has found that the direct effect of harm to a business occurs, at a minimum, in the place where that business is organized or in its principal place of business, no matter where the harm-causing "legally significant acts" occurred. The illogic and unfairness of *Antares I* and *II* is exacerbated by the fact that, under the ruling at issue here, a foreign company can claim a "direct effect" if it can show financial injury in the U.S., but a local New York business cannot.

As indicated above, two prior panels of the Second Circuit have explicitly held that "a direct effect" of harm to a business is incurred where that business is located. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), *aff'd sub nom., Republic of Argentina v. Weltover*, ____ U.S. ____, 112 S. Ct. 2160 (1992); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (Kaufman, J.), *cert. denied*, 454 U.S. 1148 (1982). "Clearly a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business." *Weltover*, 941 F.2d at 152.

Similarly, in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), the Second Circuit reaffirmed the principle that, for purposes of the "direct effect" clause, "[a]n injury to a corporation occurs in some legally significant situs, for instance, *the place of incorporation, or* a place designed for performance of a contract." *Id.* at 11-12 n.3 (citations omitted) (emphasis supplied).[4]

And until this case, the district courts in the Second Circuit had also uniformly ruled that a U.S. business harmed abroad in commercial dealings with a foreign sovereign *ipso facto* suffers "a direct effect in the United States." *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 907 (S.D.N.Y. 1986) (although all legally significant acts took place outside the United States, FSIA jurisdiction was found "because the breach had a 'direct effect' in the United States, namely, a financial loss suffered by the beneficiary of the contract, a New York corporation."); *Exchange Nat'l Bank of Chicago v. Empresa Minera del Centro del Peru S.A.*, 595 F. Supp. 502, 505 (S.D.N.Y. 1984) (where Peru was situs of legally significant act, subject matter jurisdiction under the FSIA warranted because "[t]he direct effect of defendants' repudiation of the promissory note was clearly felt in the United States where

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[4] Unlike the plaintiff here, both plaintiffs in *International Housing* were foreign companies. Therefore, as in *Weltover*, the court's inquiry in *International Housing* focused on the alternative analysis of whether the acts giving rise to the claim were "in the United States." Nonetheless, the *International Housing* court took note of the obvious fact that a direct effect occurred where the defendant *benefited* from the payments, that is, "at its situs in Iraq." *Id.* at 12. Thus, *International Housing* again reaffirmed the principle that a direct effect upon a business is felt where that business is located.

[plaintiff], an American entity, suffered its monetary loss.")[5]; *In re Rio Grande Transp., Inc.*, 516 F. Supp. 1155, 1163 (S.D.N.Y. 1981), (direct effect of a tort committed overseas against a U.S. business was "in the United States" within the meaning of § 1605(a)(2) because plaintiff's ship "was the sole source of income of Rio Grande, a New York corporation, and, accordingly, Rio Grande was unable to earn freight or other monies for a considerable period of time after the collision."). *See also L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 121 (S.D.N.Y. 1988) ("[e]ffects jurisdiction derives from a state's interest in protecting those within its borders and in governing events within its borders.") (quoting Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L. Rev. 474, 512 (1980)).

If the ruling in *Antares II* is allowed to stand, all of these decisions are in effect overruled because the "legally significant act" in each occurred outside of the U.S. Thus, the opinion calls for a dramatic but *sub silentio* reversal of the Second Circuit's FSIA jurisprudence that would severely and arbitrarily narrow the application of the "commercial activity" exception. This Court should grant certiorari to correct this unjustifiable evisceration of rights under international law.

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[5] Although the FSIA requirements for FSIA subject matter jurisdiction were satisfied, the court found that personal jurisdiction was lacking.

CONCLUSION

For the reasons set forth above, Antares respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 91-7342

ANTARES AIRCRAFT, L.P.,

Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA,
Nigerian Airports Authority,

Defendants-Appellees.

Submitted: August 17, 1992
Decided: October 28, 1991
Vacated: June 29, 1992
Decided: July 21, 1993

David F. Dobbins, New York City (Patterson, Belknap, Webb & Tyler, of counsel), for plaintiff-appellant.

Stephen D. Hoffman, New York City (Robert M. Klingon, Sive, Paget & Riesel, of Counsel), for defendant-appellee Federal Republic of Nigeria.

Paul S. Reichler, Washington, D.C. (David K. Schoor, Reichler & Soble, of counsel), for defendant-appellee Nigerian

Airports Authority.

Before: LUMBARD, WINTER and ALTIMARI, Circuit Judges.

WINTER, Circuit Judge:

Antares Aircraft, L.P. brought this action for damages against appellees Federal Republic of Nigeria ("FRN") and Nigerian Airports Authority ("NAA") for the purportedly wrongful detention of Antares' aircraft. The district court granted appellees' motion to dismiss the complaint for lack of subject matter jurisdiction, and we affirmed. *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90 (1991), *vacated*, ____ U.S. ____, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). The Supreme Court vacated our decision and remanded for further consideration in light of *Republic of Argentina v. Weltover, Inc.*, ____ U.S. ____, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). Upon reconsideration, we again affirm because there was no "direct effect" of appellees' legally significant conduct in the United States, and the "commercial activity" exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), *see* 28 U.S.C. §§ 1602-1611 (Supp. II 1990), does not apply. *See* 28 U.S.C. § 1605(a)(2).

We assume familiarity with our previous decision, *Antares*, 948 F.2d at 92-93. Antares Aircraft is a Delaware limited partnership with its principal place of business in New York. The partnership's sole asset is a DC-8-55 aircraft registered in Nigeria. Purportedly because a former lessee of the plane had not paid certain airport landing and parking fees, the airplane was detained at the Murtala Muhammed Airport in Lagos, Nigeria. NAA, the airport authority, refused to release the airplane until the outstanding obligations were paid. After Antares' representatives negotiated with NAA in Nigeria, Antares sent payments totaling roughly $100,000 from a New York bank account. *Id.* at 93. Most of the money was sent to Nigeria and paid in Nigerian currency. Appellees claim that one of the payments went to a California bank to pay Antares' local

counsel. *Id.* On May 23, 1989, after roughly five months, the plane was released. *Id.* at 93, 95. Meanwhile, it had suffered physical damage as a result of exposure to the elements.

Thereafter, Antares filed this action against FRN and NAA in the Southern District of New York to recover damages for the alleged conversion of its plane. The FSIA bars lawsuits in state or federal courts against foreign states unless one of its exceptions applies. Appellees moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1603(a) (definition of "foreign state"); *Antares*, 948 F.2d at 93; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39, 109 S.Ct. 683, 687-91, 102 L.Ed.2d 818 (1989). Finding that none of the FSIA's exceptions were applicable, the district court dismissed the action for lack of subject matter jurisdiction.

On appeal, we rejected Antares' claim that either the "commercial activity' or the "expropriation" exceptions to the FSIA provided a ground for subject matter jurisdiction. We reasoned that the "direct effect" of appellees' legally significant conduct occurred in Nigeria and that appellees did not engage in "commercial activity in the United States in the United States." *See* 28 U.S.C. § 1605(a)(2), (a)(3); Antares, 948 F.2d at 95-97.

With regard to the "commercial activity" exception, our opinion relied upon *Weltover, Inc. v. Republic of Argentia*, 941 F.2d 145 (2d Cir. 1991), aff'd, ____ U.S. ____, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). In *Weltover*, plaintiffs, a Swiss bank and two Panamanian corporations, owned approximately $1.3 million worth of bonds issued by the Republic of Argentina. Like bonds issued by a private entity, they had a repayment schedule including periodic interest and principal repayment at maturity. The bonds were U.S. dollar-denominated, and New York was the designated place of performance and where interest payments had been made. New York was also the location of Argentina's appointed financial agent. At the bonds' maturity in May 1986, Argentina attempted

unilaterally to reschedule the bond payments. Plaintiffs rejected the rescheduling and brought suit in the Southern District of New York.

We held that the district court had jurisdiction under the "commercial activity" exception of the FSIA, *see Weltover*, 941 F.2d 145, 153, *aff'd*, ____ U.S. ____, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), because the "legally significant act," the breach, had a "direct effect in the United States," namely, payment was to take place in New York but did not. In 1992, the Supreme Court granted certiorari in *Weltover* and thereafter affirmed, holding, *inter alia*, that the "direct effect" of Argentian's breach of contract was in the United States. The Court vacated our *Antares* decision and remanded it for further considerations light of its decision. Because we find nothing in the Supreme Court's decision in *Weltover* that undermines our holding in *Antares*,[1] we again affirm.

According to Section 1604 of the FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless the foreign state's conduct falls within one of the statutory exceptions. 28 U.S.C. §§ 1604, 1605-07; *Amerada Hess*, 488 U.S. at 434, 109 S.Ct. at 687-88; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n. 5, 493-94, 103 S.Ct. 1962, 1967 n. 5, 1971-72, 76 L.Ed.2d 81 (1983). The parties do not dispute that the NAA and the FRN qualify as "foreign states" and are immune absent an applicable statutory exception. The only exception at issue on this remand from the Supreme Court is that for "commercial activity," *see* 28 U.S.C. § 1605(a)(2).

The "commercial activity" exception provides for jurisdiction in cases "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial

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[1] The Court's decision vacating our opinion does not imply a view as to the proper outcome on remand. *See, e.g. Beauford v. Helmsley*, 893 F.2d 1433 (2d Cir. 1989) (reinstating previous en banc decision after reconsideration in light of Supreme Court decision).

activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The following is not in dispute. The "act outside the territory of the United States" was the allegedly wrongful detention of the plane in Nigeria. The detention of the aircraft and collection of fees were "in connection with a commercial activity of the foreign state." *See Antares*, 948 F.2d at 94. The final element of the "commercial activity" exception poses the issue remaining on this remand, namely, in light of *Weltover*, did the detention of the aircraft cause "a direct effect in the United States?"

In *Weltover*, the Court endorsed our view that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" ____ U.S. at ____, 112 S.Ct. at 2168 (quoting *Weltover*, 941 F.2d at 152); *see also Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993) (finding plaintiff's accident and injury in Georgia to be "immediate consequence" of French carmaker's allegedly defective design and manufacture). The Court did, however, reject our analytic approach of inquiring into what Congress "would have wanted." The Court held, rather, that the proper "question ... is not what Congress 'would have wanted' but what Congress enacted in the FSIA." ____ U.S. at ____, 112 S.Ct. at 2168 (quoting *Weltover*, 941 F.2d at 153).[2] The Court also rejected as "too remote and attenuated," *id.*, any suggestion that the ground for the "direct effect in the United States" was a diminution in New York's status as "a world financial leader." 941 F.2d at 153. Nevertheless, the Court had "little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the [bonds] had a 'direct effect' in the United States" because New York was the contractually designated "place of performance." ____ U.S. at ____, 112 S.Ct. at 2168.

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[2] Because the "what Congress 'would have wanted'" reasoning was not a basis for our *Antares* decision, the Court's rejection of this aspect of our analysis in *Weltover* does not undermine the holding in *Antares*.

Although the Court did not expressly adopt our "legally significant acts" test, it used a similar analysis. *Weltover* involved a breach of contract, and the Court found decisive the fact that the contractually designated place of performance was New York. The "legally significant" act was thus the breach that occurred in the United States. In tort, the analog to contract law's place of performance is the locus of the tort, here Nigeria. However, the analogy is not precise. Although a contractual provision designating the United States as the place of performance is sufficient to *vest* jurisdiction under the FSIA, a foreign tort is not necessarily sufficient to *deprive* federal courts of jurisdiction because the foreign tort may have had sufficient contacts with the United States to establish the requisite "direct effect" in this country.

However, in the instant matter, all legally significant acts took place in Nigeria. The aircraft was registered in Nigeria. There is no evidence that the use of the aircraft was related to substantial commerce with the United States. The detention of, and physical damage to, the plane happened in Nigeria. The alleged conversion thus occurred in Nigeria. Moreover, the negotiations over, and the payment of, the outstanding fees occurred in Nigeria and utilized Nigerian currency.

That the money came from a bank account in New York is a fact but one without legal significance to the alleged tort. The Nigerian authorities were indifferent to the geographic location of the source of the money used to pay the fees. Their demands would have been satisfied had Antares paid from a London checking account or borrowed the funds from a bank in Lagos. Wherever the source of the money, payment had to be in Nigeria, just as the payment in *Weltover* had to be in New York. The tort thus began in Nigeria with the detention of the aircraft and ended in Nigeria with the payment of the money. Unlike *Weltover*, where the parties had agreed that performance was to occur in New York, the sole act connected to the United States in the instant matter, the drawing of a check on a bank in New York, was entirely fortuitous and entirely

unrelated to the liability of the appellees.[3]

Antares argues that a "direct effect" of the tort occurred in the United States because an American partnership suffered a financial loss. We are unpersuaded. To be sure, the detention of Antares' sole asset affected the financial well-being of the American partnership. However, the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception. *See Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987) (finding that financial injury of person injured abroad is not "direct effect" in United States); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987) ("consequential damages [from personal injury tort abroad] are insufficient to constitute a 'direct effect in the United States' for purposes of abrogating sovereign immunity"), *cert. denied*, 484 U.S. 1043, 108 S.Ct., 775, 98 L.Ed.2d 862 (1988); *Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984) (similar), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1189, 84 L.Ed.2d 335 (1985); *Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F. Supp. 1457, 1465 (S.D.N.Y. 1986) (finding American bank's loss on ship mortgage from ship seizure to be indirect effect).

If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states. Many commercial disputes, like the present one, can be pled as the torts of conversion or fraud and would, if appellant is correct, result in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff. Similarly, personal injury actions based on torts with no connection with this country, except for the plaintiff's citizenship,

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3 Where or how appellant paid its attorney is of no relevance.

might be brought under appellant's theory. For example, an American citizen injured in a foreign city by a government-owned bus company might sue here if the commercial activity exception is triggered solely by the fact that the citizen's wealth is diminished by the accident. We find it difficult to characterize such an effect, standing alone, as "direct" or to read into this otherwise somewhat restrictive legislation an all-encompassing jurisdiction for foreign torts.

We therefore reaffirm our prior decision.

ALTIMARI, Circuit Judge, dissenting:

Because I believe that the Supreme Court's affirmance of this Court's decision in *Weltover v. Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), aff'd, ____ U.S. ____, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), coupled with the Court's decision to vacate and remand the instant case for further consideration in light of *Weltover*, see *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, ____ U.S. ____, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), indicates that the Court believes that an American firm suffers a direct effect in the United States as a result of the expropriation of its property by a foreign sovereign, I must respectfully dissent.

Antares Aircraft, L.P. is an American limited partnership, whose legal status is not unlike that of a corporation.[4] As we noted in *Weltover*, "[w]here the plaintiff is a corporation, 'the relevant inquiry under the direct effect clause ... is whether the corporation has suffered a "direct" financial loss.'" *Weltover*, 941 F.2d at 152 (quoting *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct 1012, 71 L.Ed.2d 301 (1982)). In *Weltover* we found it clear that "a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business." *Id.* Such must also hold true for an American firm seeking an assertion of jurisdiction under the Foreign Sovereign Immunities Act in order to recover a plane seized by a foreign sovereign.

Obviously corporations and limited partnerships are not natural persons, and consequently can only suffer financial rather than physical injuries. As noted above, in *Weltover* we concluded that these financial injuries are directly felt where a firm was organized or where its principal place of business is located. *Id.* By contrast, an individual suffers a physical injury at the location where the mishap occurs. Therefore, especially given the Supreme Court's affirmance of our analysis in *Weltover*, I find the majority's reliance on personal injury cases to be unpersuasive. *See, e.g., Martin v.*

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[4] Although I acknowledge that notwithstanding this fact, limited partnerships are treated differently than corporations in the "technical, precedent-bound" area of diversity jurisdiction. *See Carden v. Arkoma Associates*, 494 U.S. 185, 195-96, 110 S.Ct. 1015, 1021, 108 L.Ed.2d 157 (1990) (holding that for purposes of determining diversity jurisdiction the citizenship of all the members of the limited partnership must be taken into account). While I do not believe that this difference in treatment is relevant, one could argue *a fortiori* that there was a pronounced effect in this country, because a limited partnership's loss would be felt in every state where a limited partner was a citizen.

Republic of South Africa, 836 F.2d 91 (2d Cir. 1987) (finding no direct effect where an American plaintiff was injured while in South Africa). Likewise, because here the American partnership was the actual owner of the plane, the one case cited by the majority involving a financial loss by an American firm is distinguishable, as the plaintiff in that case was the mortgagee rather than the owner of the vessel arrested. *See Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F.Supp. 1457, 1464-65 (S.D.N.Y. 1986) (concluding that the seizure of a vessel had a direct effect on the owner but only an indirect effect on the mortgagee). Accordingly, upon further reflection in light of the Supreme Court's affirmance of our decision in *Weltover* and its subsequent remand of the instant case in light of *Weltover*, I conclude that the American partnership suffered a direct effect in the United States within the meaning of § 1605(a)(2) of the Foreign Sovereign Immunities Act.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of July, one thousand nine hundred and ninety-three.

PRESENT: HON. J. EDWARD LUMBARD,
HON. RALPH K. WINTER,
HON. FRANK X. ALTIMARI,

Circuit Judges,

91-7342

ANTARES AIRCRAFT, L.P.,

Plaintiff-Appellant,

v.

FEDERAL REPUBLIC OF NIGERIA,
NIGERIAN AIRPORTS AUTHORITY,

Defendants-Appellees.

This action herein having been taken to the Supreme Court of the United States by writ of certiorari and said court having vacated

the judgment of this court and remanded the action for further consideration; in light of *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160 (1992), the matter having been taken on submission.

ON CONSIDERATION WHEREOF, it is ORDERED, ADJUDGED and DECREED that the action herein be and it hereby is reaffirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro
Staff Attorney

APPENDIX C

APPENDIX C

ANTARES AIRCRAFT, L.P., petitioner,
v. FEDERAL REPUBLIC OF NIGERIA, et al.

No. 91-1646

Case below, 948 F.2d 90.

June 29, 1992. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Republic of Argentina v. Weltover, Inc.*, 504 U.S. _____, 112 S.Ct. 2160, _____ L.Ed.2d _____ (1992).

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 30-August Term, 1991

Argued Sept. 24, 1991 Decided Oct. 28, 1991

Docket No. 91-7342

ANTARES AIRCRAFT, L.P.,

Plaintiff-Appellant,

-v.-

FEDERAL REPUBLIC OF NIGERIA,
and Nigerian Airports Authority,

Defendants-Appellees.

David F. Dobbins, New York City (Patterson, Belknap, Webb & Tyler, of counsel) for plaintiff-appellant.

Doris K. Shaw, New York City (Warshavsky, Hoffman & Cohen, P.C., of counsel) for defendant-appellee Federal Republic of Nigeria.

David Wippman, Washington, D.C. (Jeffrey Dunoff, Reichler & Soble, Washington, D.C. and James Reichler, White Plains, N.Y., of counsel) for defendant-appellee Nigerian Airports Authority.

Before LUMBARD, WINTER and ALTIMARI, *Circuit Judges.*

ALTIMARI, *Circuit Judge:*

Plaintiff-appellant Antares Aircraft, L.P. ("Antares"), a Delaware limited partnership with its principal place of business in New York, appeals from a judgment of the United States District Court for the Southern District of New York (John S. Martin, Jr., Judge), dismissing its claim against defendants-appellants the Federal Republic of Nigeria ("FRN") and the Nigerian Airports Authority ("NAA") for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *See* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1441(d), and 1602-1611 (1988). Antares brought the underlying action to recover damages for the alleged conversion of its aircraft in Nigeria, claiming that the NAA, a Nigerian corporation established pursuant to governmental decree and responsible for the operation and management of all airports in Nigeria, wrongfully detained its aircraft in Nigeria until Antares paid certain airport parking and landing fees that its lessee allegedly owed to the NAA. Antares paid these fees using funds from its New York bank account. Antares attributed the NAA's conduct to the FRN by arguing that the NAA is not truly a separate entity, but is owned and operated by the FRN and is essentially the FRN's agent.

The defendants moved to dismiss the complaint, contending that the district court lacked subject matter jurisdiction under the FSIA because neither the FSIA's "commercial activity" exception, *see* 28 U.S.C. § 1605(a)(2), nor its ("expropriation" exception, *see* 28 U.S.C. § 1605(a)(3), applied. The district court granted the motion and dismissed the case. The court reasoned that the "commercial activity" exception did not apply because the alleged conversion of Antares' aircraft in Nigeria did not have a "direct effect in the United States" within the meaning of § 1605(a)(2). Rather, according to the district court, the direct effect of the defendants' conduct occurred in Nigeria where the aircraft was detained and suffered damage from exposure to the elements. The court thus rejected Antares' contention that the financial loss it suffered as a result of the defendants' conduct overseas was alone sufficient to satisfy the "direct effect in the United States" test of § 1605(a)(2). The court further held that the "expropriation" exception did not apply because the NAA did not conduct any commercial activity in

the United States, a necessary element of this exception. See 28 U.S.C. § 1605(a)(3).

Antares appeals from the judgment of dismissal, contending, among other things, that the district court erred in finding that the financial loss Antares incurred in the United States as a result of the alleged conversion of its aircraft in Nigeria was not "a direct effect in the United States" within the meaning of § 1605(a)(2) of the FSIA. Antares also argues that the district court erred in determining that Antares failed to allege facts sufficient to conclude that the NAA engaged in commercial activity in the United States, and consequently, in ruling that the "expropriation" exception did not apply. For the reasons set forth below, we affirm the judgment of the district court.

BACKGROUND

Plaintiff-appellant Antares is the owner of a DC-8-55 aircraft, its sole asset. In February 1988, Antares leased the plane to Gam Air, Ltd. ("Gam Air"), a Gambian corporation. Thereafter, Antares assigned its interest as lessor to Expert Air, Ltd. ("Expert Air"), a Nigerian company. Prior to November 1988, both Gam Air and Expert Air apparently defaulted on their respective obligations under these agreements. As a result of Expert Air's default, it appears that Antares regained possession of the aircraft.

In addition to its default, Gam Air also failed to pay the pilots and crew of the aircraft in a timely fashion. In order to recover the wages allegedly due, the pilots and crew of the aircraft commenced an action in Nigeria against Gam Air and Expert Air sometime after November 10, 1988. In connection with that action, a Nigerian court issued an order of attachment covering the aircraft. At that time, the aircraft was at the Murtala Muhammed Airport in Lagos, Nigeria.

To protect its interest in the aircraft, Antares sought from the Nigerian court, and was granted, the right to intervene as a defendant in the action. Subsequently, the Nigerian court lifted the order of attachment and Antares planned to fly the aircraft to the

United States. However, according to Antares, the NAA refused to allow it to remove the aircraft until it paid certain parking and landing fees allegedly incurred by Gam Air and owed to the NAA. Negotiations ensued in Nigeria between Antares' representatives and the NAA concerning the amount of fees due. Antares claims that, in order to regain control of its aircraft, it was forced to make a series of payments to the NAA from January 1989 until May 1989 totaling approximately $100,000. The bulk of these payments were wired from Antares' New York bank account to the NAA's agent in Nigeria. Antares also claims that the NAA directed that one payment be deposited into a California bank account. That account did not, however, belong to the NAA, but apparently belonged to Antares' local Nigerian counsel. In any event, after paying the outstanding parking and landing fees, Antares flew the aircraft out of Nigeria in May 1989.

Five months later, Antares commenced the underlying action against the FRN and the NAA in the United States District Court for the Southern District of New York to recover damages stemming from the detention and alleged conversion of the aircraft in Nigeria. The complaint alleged that the NAA wrongfully detained the aircraft as part of a scheme to extort payments from Antares. While Antares did not claim that the FRN participated directly in this undertaking, it sought to hold the FRN liable on the theory that the FRN owned and operated NAA and that the NAA was, in effect, an agent of the FRN, and not a separate corporate instrumentality.

The defendants moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction under the FSIA. Under the FSIA, federal and state courts are without subject matter jurisdiction to entertain an action against a "foreign state," as defined in 28 U.S.C. § 1603(a), unless the claim falls under one of the statutory exceptions set forth in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. § *1604; Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 687, 102 L.Ed.2d 818 (1989); *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991). The parties agreed that the alleged actions qualify as the activities of a "foreign state," and thus the FRN and the NAA were entitled to immunity unless one of the FSIA

exceptions applied. The district court dismissed the case after finding, among other things, that neither the commercial activity" exception, 28 U.S.C. § 1605(a)(2), nor the "expropriation" exception, 28 U.S.C. § 1605(a)(3), applied.

With regard to the "commercial activity" exception, the court found that the detention and alleged conversion of the aircraft in Nigeria did not cause a "direct effect in the United States" within the meaning of the statute. According to the district court, the direct effect of the NAA's conduct occurred in Nigeria where the plane was detained and where it supposedly suffered damage from exposure to the elements. Although the alleged conversion may have caused Antares financial loss in the United States to the extent that it had to pay the parking and landing fees out of its New York bank account, the court concluded that this loss was an indirect consequence of the defendants' activity. The district court thus rejected Antares' claim that the financial loss it suffered in the United States as a result of the defendants' conduct overseas was alone a sufficient jurisdictional nexus to this country to satisfy § 1605(a)(2). The district court observed that the statutory test was not satisfied even assuming, as Antares alleged, that some of the funds transferred to the NAA were first paid into a California bank account (apparently belonging to Antares' Nigerian local counsel) at the NAA's request.

The district court also held that the "expropriation" exception did not apply because Antares failed to allege sufficient facts from which it could be inferred that the NAA conducted "commercial activity in the United States," a necessary element of this exception. *See* 28 U.S.C. § 1605(a)(3). The court pointed out that the NAA had submitted sworn affidavits demonstrating the absence of commercial activity in this country.

Because the district court found that none of the FSIA exceptions applied, it dismissed the complaint against both defendants. This appeal followed.

DISCUSSION

The FSIA provides the sole source of subject matter jurisdiction

in cases involving foreign states. *See Shapiro*, 930 F.2d at 1017. Under the FSIA, a foreign state is entitled to immunity from suit unless its conduct falls within one of the statutory exceptions set forth in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. § *1604; Amerada Hess*, 488 U.S. at 434, 109 S.Ct. at 687; *Shapiro*, 930 F.2d at 1017. "When one of these exceptions applies, the foreign sovereign is stripped of immunity, and, pursuant to 28 U.S.C. § 1330(a), subject matter jurisdiction exists in the district court." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 148 (2d Cir. 1991).

It is undisputed that the activities of the NAA and the FRN are those of a "foreign state" within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a)-(b). Therefore, unless one of the FSIA exceptions applies, there is no subject matter jurisdiction in the instant action. Under the FSIA, the foreign state has the burden of proving that it is entitled to sovereign immunity, i.e., that its conduct is not covered by a FSIA exception. *See, e.g., L'Europeenne de Banque v. La Republica de Venezuela*, 700 F.Supp. 114, 119 (S.D.N.Y.1988); *Braka v. Bancomer, S.A.*, 589 F.Supp. 1465, 1467 (S.D.N.Y.1984), *affd*, 762 F.2d 222 (2d Cir.1985); *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted* in 1976 U.S.C.C.A.N. 6604, 6616. For purposes of this appeal, the two relevant exceptions are the "commercial activity" exception, *see* 28 U.S.C. § 1605(a)(2), and the "expropriation" exception, *see* 28 U.S.C. §§ 1605(a)(3).

A. The "Commercial Activity" Exception.

The "commercial activity" exception provides in relevant part that subject matter jurisdiction exists in a case "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The parties do not dispute that the NAA's detention of the aircraft in Nigeria and collection of allegedly outstanding parking and landing fees were a commercial activity undertaken as part of its management of the Murtala Muhammed Airport. The primary issue on appeal is thus whether the detention of Antares' aircraft in Nigeria caused a "direct effect in the United States." More precisely, the question presented is whether the effect

of the defendants' conduct was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?" *Weltover*, 941 F.2d at 152 (citation omitted). Antares contends that a direct effect occurred in this country because it suffered economic loss as a result of the aircraft's detention, and was forced to transfer funds out of its New York bank account to free the aircraft.

This Court has not squarely confronted the issue of whether there is a "direct effect in the United States" when an American corporation or partnership suffers a financial loss in the United States as a result of a foreign state's conduct abroad. *See International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11 n. 3 (2d Cir. 1989); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 n. 35 (2d Cir.1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). In addressing this issue, we must first consider whether the detention of the aircraft caused a sufficiently "direct effect" to Antares. Where, as here, the plaintiff is a legal person, as opposed to a natural person, any injury it incurs is, as a matter of course, financial. *See Weltover*, 941 F.2d at 152; *Texas Trading*, 647 F.2d at 312. "For the financial loss to be 'direct,' the corporate entity must itself be placed in financial peril as an immediate consequence of the defendant's unlawful activity." *Weltover*, 941 F.2d at 152. Undoubtedly, the detention of Antares' aircraft, its sole asset, for approximately five months had a "direct effect" on Antares. The issue we must consider is whether that "direct effect" occurred "in the United States."

In determining where the effect of a defendant's conduct is felt directly, "courts often look to the place where legally significant acts giving rise to the claim occurred." *Weltover*, 941 F.2d at 152 (citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir.1988) (for there to be a direct effect in the United States, some legally significant event must actually occur here)). For example, in *Weltover*, a foreign corporate plaintiff purchased bonds issued by a foreign state. The plaintiff exercised a contractual option to have the bonds paid in New York. The defendant foreign state failed to make payment when the bonds became due and the plaintiff sued for breach of contract. We were required to determine, among

other things, whether the defendants' failure to pay caused a direct effect "in the United States." Eschewing as "too facile" an approach that would limit the effect of a defendant's conduct to the corporate plaintiff's place of incorporation or principal place of business, we held that the direct effect on the foreign plaintiff of defendants' failure to pay on the bonds occurred in the first instance in New York, because "the legally significant act," i.e., defendants' breach of the contract, occurred in New York. *Weltover*, 941 F.2d at *153; see also Texas Trading*, 647 F.2d at 312 (direct effect of defendant's breach of contract was "in the United States" because the plaintiffs were American and because payment was to be made in the United States).

In the instant case, the "legally significant act"--the detention and alleged conversion of the aircraft--occurred in Nigeria. In addition, all negotiations concerning the fees due took place in Nigeria, and the bulk of the payments to the NAA were wired directly to the NAA's agent in Nigeria. Thus, although Antares is an American partnership, the effect of the defendants' conduct abroad was not felt directly "in the United States" but in Nigeria. That is, the direct effect of detaining the plane was, as the district court found, the loss of the use of the aircraft and the physical damage it suffered *in Nigeria*, and not, as Antares alleges, the financial loss that Antares suffered in the United States. *See Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir.1984) (direct effect of plane crash in Indonesia was in that country, where the plane was destroyed and its functional use lost, and not in the United States where the American corporate plaintiff incurred financial loss as a result of the crash), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1189, 84 L.Ed.2d 335 (1985); *cf. Martin v. Republic of South Africa*, 836 F.2d 91, 94-95 (2d Cir. 1987) (although plaintiff returned to the United States disabled as a result of defendant's conduct in South Africa, the direct effect of that conduct occurred in South Africa, not in the United States). The transfer of funds out of Antares' New York bank account, and the resultant financial loss to the partnership, are not by themselves sufficient to place the effect of the defendants' conduct "in the United States" within the meaning of § 1605(a)(2). *See Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir.), *cert. denied*, *493* U.S. 891, 110 S.Ct. 237, 107 L.Ed.2d 188

(1989); *Zedan*, 849 F.2d at 1515.

Antares contends, however, that the effect "in the United States" was not limited to its financial loss. It claims that the NAA directed it to make at least one payment into a California bank account. According to Antares, this contact, in conjunction with its financial loss, places the direct effect of the defendants' conduct in the United States. We disagree.

Even assuming that the NAA directed that a portion of the money be deposited into the American bank account of a third party, this effect would not alone, or together with Antares' general financial loss, constitute a sufficiently direct effect in this country to satisfy the statute. *See Rafidain Bank*, 893 F.2d at 12 (foreign defendant's direction that money be deposited into its New York bank account does not satisfy "direct effect" test). *But see Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C.Cir.1985) (foreign sovereign's seizure of American vessel overseas causing American corporate plaintiff to transfer large sum of money from its United States bank to foreign sovereign's United States bank, and causing plaintiff to incur substantial debts in United States, caused direct effect in this country). Thus, absent some legally significant act occurring in this country, the mere financial loss suffered by an American plaintiff, such as Antares, as a result of a defendant's conduct abroad, is by itself insufficient to cause "a direct effect in the United States" within the meaning of § 1605(a)(2) of the FSIA. *See Gregorian*, 871 F.2d at 1527; *Zedan*, 849 F.2d at 1515.

In sum, the NAA's detention of Antares' aircraft in Nigeria, and Antares' subsequent transfer of funds from its New York bank, did not cause a "direct effect in the United States" under § 1605(a)(2). Accordingly, subject matter jurisdiction in the instant case does not exist under the FSIA's "commercial activity" exception.

B. The "Expropriation" Exception.

The FSIA's "expropriation" exception provides that subject matter jurisdiction exists in a case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). The district court found that the "expropriation" exception did not apply because Antares failed to allege facts sufficient to support a finding that the NAA engaged in commercial activity in this country. Antares merely asserted to the district court that because the NAA was an international airport authority, it must conduct commercial activity in the United States. In contrast, the court observed that the NAA had submitted in support of its motion to dismiss a sworn affidavit from its legal counsel that unequivocally stated, among other things, that the NAA did not own or operate any businesses in the United States, held no bank accounts in the United States, and had never purchased goods or services or entered into contracts in this country.

On appeal, Antares argues that the district court erred in finding that the NAA did not engage in commercial activity in the United States. Specifically, Antares claims that the district court improperly credited the NAA's evidence and failed to credit true Antares' allegations concerning the NAA's commercial activity. Antares further argues that the court erred by failing to consider the FRN's commercial activity in this country in determining whether the "expropriation" exception applied. We find Antares' arguments unpersuasive.

On a motion under Fed.R.Civ.P.12(b)(1) challenging the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by references to evidence outside the pleadings, such as affidavits. *See, e.g., Kamen v. American Tel. & Tel Co.*, 791 F.2d 1006, 1011 (2d *Cir.1986); Exchange Natl Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d

Cir.1976); *Weltover, Inc. v. Republic of Argentina*, 753 F.Supp. 1201, 1203 n. 2 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir.1991); *Braka*, *589* F.Supp. at 1468. In the instant case, Antares failed, in either its complaint or in the affidavit submitted in opposition to the defendants' motions to dismiss, to allege any facts that would support an inference that the NAA engaged in commercial activity in the United States. Antares' unsupported assertion to the district court that, by its very nature, the NAA must engage in commercial activity in this country, even if taken as true, *see Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974), is insufficient to support a finding of commercial activity in the face of the NAA's sworn affidavit evidence to the contrary. *See Braka*, 589 F.Supp. at 1468.

Antares next argues that the district court erred in disregarding the FRN's commercial activity in the United States in determining whether the "expropriation" exception applied. According to Antares, the FRN's commercial activity in this country should have been attributed to the NAA because Antares alleged that the NAA was owned and controlled by the FRN and was, in effect, an agent of the FRN. Antares' argument is unavailing.

First, § 1605(a)(3) specifically distinguishes between when the commercial activity of the "foreign state" is relevant and when such activity of the "agency or instrumentality of a foreign state" is to be considered in determining the existence of subject matter jurisdiction. Under the statute, assuming that rights in property have been taken in violation of international law, then the "expropriation" exception applies if (1) the property taken or any property exchanged therefore "is present in the United States *in connection with a commercial activity carried on in the United States by the foreign state,*" or (2) such property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality . . . [must] engage[ ] in commercial activity in the United States." 28 U.S.C. § 1605(a)(3) (emphasis added). Although the term "foreign state" encompasses its agencies and instrumentalities, *see* 28 U.S.C. § 1603(a), the reverse is not the case. Since Antares has not alleged that any property at issue is present in the United States in connection with the FRN's commercial activity here, the plain

language of the statute focuses the inquiry on, among other things, the commercial activity of the "agency or instrumentality"--here the NAA--and not on that of the FRN. In addition, Antares' claims to the contrary notwithstanding, we see no reason to depart from the general rule that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27, 103 S.Ct. 2591, 2599600, 77 L.Ed.2d 46 (1983); *Dayton v. Czechoslovak Socialist Republic*, 672 F.Supp. 7, 10 (D.D.C.1986), *aff'd*, 834 F.2d 203 (D.C.Cir.1987), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2820, 100 L.Ed.2d 921 (1988).

Moreover, even assuming that the NAA was an agent of the FRN, as opposed to an independent corporate entity, it would be inappropriate to attribute the FRN's commercial activity in the United States to the NAA for purposes of establishing subject matter jurisdiction under the FSIA based on the NAA's alleged expropriation of Antares' property in Nigeria. Under general principles of agency law, although the jurisdictional contacts of an agent may properly be imputed to the principal, the reverse is not true. *Cf. Gilson v. Republic of Ireland*, 606 F.Supp. 38, 44 (D.D.C.1984), *affd*, 787 F.2d 655 (D.C.Cir.1986); *Grove Valve & Regulator Co. v. Iranian Oil Servs., Ltd.*, 87 F.R.D. 93, 96 (S.D.N.Y.1980) (Weinfeld, J.). The district court therefore did not err in refusing to attribute the FRN's commercial activity in the United States to the NAA in determining that the NAA did not engage in commercial activity in this country. Accordingly, the court correctly concluded that it had no subject matter jurisdiction regarding either defendant in this action.

CONCLUSION

We have examined each of Antares' remaining contentions and find them to be without merit. Based on the foregoing, the judgment of the district court dismissing this case for lack of subject matter jurisdiction is affirmed.

APPENDIX E

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed October 28, 1991

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of October, one thousand nine hundred and ninety-one.

PRESENT: HON. J. EDWARD LUMBARD
HON. RALPH K. WINTER
HON. FRANK X. ALTIMARI

Circuit Judges.

ANTARES AIRCRAFT, L.P.,

Plaintiff-Appellant,

FEDERAL REPUBLIC OF NIGERIA, and
NIGERIAN AIRPORTS AUTHORITY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk

By: /s/ EDWARD J. GUARDARO

Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ ELAINE B. GOLDSMITH
Clerk

APPENDIX F

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 6513 (JSM)

ANTARES AIRCRAFT L.P.,

Plaintiff,

-against-

FEDERAL REPUBLIC OF NIGERIA, NIGERIAN AIRPORTS AUTHORITY and TOTAL NIGERIA LTD.,

Defendants.

MEMORANDUM OPINION AND ORDER

JOHN S. MARTIN, JR., United States District Judge:

Plaintiff Antares Aircraft L.P. ("Antares"), commenced this action against the Federal Republic of Nigeria ("FRN"), the Nigerian Airports Authority ("NAA") and Total Nigeria Ltd. ("Total Nigeria") to recover damages for the alleged conversion of its aircraft in Lagos, Nigeria. Subject matter jurisdiction in this Court is asserted under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. Both the FRN and the NAA have moved for an order dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(1) on the ground that this Court lacks subject matter jurisdiction by virtue of sovereign immunity and on the ground of *forum non conveniens*. In addition, the NAA moves for an order dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(2) on the ground that the plaintiff lacks personal jurisdiction over the NAA. For the reasons set forth below, the defendants' motion to dismiss for lack of subject

matter jurisdiction is granted.

I. BACKGROUND

Antares, a limited partnership with its principal place of business in New York, claims that its aircraft was unlawfully detained by the NAA in Lagos, Nigeria. Specifically, Antares alleges that the NAA, a Nigerian corporation responsible for the operation and management of all airports in Nigeria, wrongfully imposed parking and landing fees upon its aircraft at the Murtala Muhammed Airport; blocked the removal of the aircraft until the parking and landing fees were paid; and refused to deregister the aircraft. Antares claims that it was not until it wired funds from New York to a bank designated by the NAA and later wired funds to the NAA's agent in Nigeria, that Antares finally regained control of its aircraft. Antares does not contend that the FRN took part in the wrongful venture, but seeks to attribute the acts of the NAA to the FRN, alleging that the NAA is owned and operated by the FRN and acts as an agent of the FRN.[1]

II. DISCUSSION

The NAA asserts that as an instrumentality of the FRN, it is entitled to avail itself of sovereign immunity as set forth in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 and thus, the complaint against it should be dismissed. We agree.[2]

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[1] The FRN states that the deregistration of the aircraft was performed by the Federal Civil Aviation Authority of the Federal Republic of Nigeria (the "FCAAN"), not the NAA. The FRN concedes that it controls the FCAAN.

[2] The FRN argues that because the NAA is a wholly separate juridical entity, its acts cannot be attributed to the FRN. Because we hold today that the NAA is not liable in this action by virtue of sovereign immunity, we need not address the issue of whether the entities are in fact truly separate.

Under the FSIA, foreign sovereigns and their instrumentalities are immune from the jurisdiction of U.S. federal and state courts unless the plaintiff's cause of action falls under one of the specified statutory exceptions set forth in 28 U.S.C. §§ 1605-1607. *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1330 (2d Cir. 1990). As the parties do not dispute that the NAA is an instrumentality of the FRN as defined in 28 U.S.C. § 1603, the question presented is whether the alleged conduct is encompassed by one of the statutory exceptions to the FSIA. Antares contends that the acts complained of fall into three of the exceptions set forth in § 1605(a). These are, respectively, the commercial activities exception, the expropriation exception and the non-commercial tort exception. As set forth below, none of these exceptions can be invoked here.[3]

A. Commercial Activities Exception

§ 1605(a)(2) provides that a foreign state, or its instrumentality, cannot avail itself of immunity under the FSIA when an action against it is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). As it is conceded that the activities supposedly engaged in by the NAA were commercial in nature, the issue to be resolved is whether the alleged conversion of Antares' aircraft in Nigeria caused a direct effect in the U.S. Antares asserts that the forced transfer of funds from its New York bank account to Nigeria constitutes a direct effect for purposes of the FSIA. In addition, Antares argues that the NAA's purported designation of a California bank account as a depository for the parking and landing fees is a further indication that the direct effects test has been satisfied.

The question of whether payment of money from a U.S. bank

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[3] The discussion which follows is equally applicable to the FRN, if in fact the refusal to deregister the aircraft was performed by the FCAAN, not the NAA.

account as a result of tortious activity abroad satisfies the direct effects test remains an open one in this circuit. Although some courts utilize a "substantial and foreseeable" test to facilitate the analysis of what constitutes a direct effect in the U.S., the Second Circuit has not adopted this approach. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982), the Court determined that a breach of an agreement by the Federal Republic of Nigeria which required payment in the U.S. and caused financial loss in the U.S., was a direct effect for the purposes of the FSIA. In reaching this conclusion, the Court rejected the "substantial and foreseeable" test and instead considered whether the effect was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." *Texas Trading*, 647 F.2d at 311 n.32, 313. However, as both the breach and the financial loss occurred in the U.S., the Court did not address the issue presented here whether there is a direct effect when an American corporation injured overseas suffers financial injury in the U.S. *Id.* at 312 n.35.

The Second Circuit again addressed the issue of what constitutes a direct effect in *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11-12 (2d Cir. 1989) and held that payment of funds into defendant's bank account in the U.S. upon directions from the defendant did not satisfy the direct effects test. Additionally, the Court concluded that since the plaintiff was not a U.S. corporation, it suffered no direct financial injury in the U.S. The Court expressly declined to address, however, the question of whether financial loss suffered by a U.S. corporation in the United States would, by itself, be sufficient for FSIA jurisdiction. *International Housing*, 893 F.2d at 11 n.3.

However that question might be answered in a breach of contract case including a U.S. plaintiff, in the tort context courts are generally unwilling to find direct effects in the U.S. when the tort complained of occurred outside the U.S. In *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987), the Second Circuit held that an American citizen, who incurred medical expenses in the

U.S. after suffering an injury abroad, did not satisfy the direct effects test. The Court stated that "[u]nlike *Texas Trading*, where no injury was sustained until American companies were denied payment in the United States from a New York bank, the injury to appellant occurred in South Africa where he became quadriplegic." *Martin*, 836 F.2d at 94. Accordingly, since the plaintiff's injury in the U.S. was an indirect consequence of the defendants' actions in South Africa, the Court held that the direct effects test was not met. *Id.* at 95.

Similarly, in the instant action, although the plaintiff may have been financially injured in the U.S., the alleged conversion of the aircraft occurred in Nigeria. Moreover, it is undisputed that the parking and landing fees at issue were incurred at the Murtala Muhammed Airport in Lagos, Nigeria, by a Nigerian registry aircraft, which was flown to Nigeria while under a lease from a Nigerian company. In addition, all communications involving the parties to this action took place in Nigeria, the parties reached an agreement as to the fees in Nigeria and payments for the fees were received by the NAA in Nigeria. Although Antares may have been financially impacted in the U.S. by the forced transfer of funds from its account, this is an indirect consequence of the alleged tortious activity in Nigeria and does not constitute a direct effect under the FSIA.

In support of its argument that the NAA's designation of a California bank as a depository further demonstrates a direct effect under the FSIA, Antares relies primarily upon *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985). The Court in *Transamerican* held that a foreign agency's detention of a ship at its port in Somali and demand for payment in the United States were direct within the meaning of the FSIA. The Court found that "[a]t the Agency's insistence, a significant transaction was effectuated in the United States, with an American corporation transferring $28,000 from a New York bank to the Somali government's D.C. bank." *Transamerican*, 767 F.2d at 1004. In light of this strong connection between the activity at issue and the U.S., the Court held that the detention and subsequent

demand were both direct and substantial under the FSIA. *Id.*

This case is readily distinguishable from the case at bar as it has not been established that the NAA either demanded to be paid in the U.S. or actually obtained funds in the U.S. Even if a California bank was designated as a depository for the requested fees, it is undisputed that the bulk of the funds were received by the NAA in Nigeria. Moreover, in reaching its decision, the D.C. Circuit utilized the "substantial and foreseeable" test which has not been employed by this circuit. Clearly, the connection here is not "sufficiently direct and sufficiently in the U.S. that Congress would have wanted an American court to hear the case." *Texas Trading*. Accordingly, the complained of conduct does not suffice to confer jurisdiction under the commercial activities exception set forth in 28 U.S.C. § 1605(a)(2).

B. Expropriation Exception

Antares further alleges that the NAA's activities fall under § 1605(a)(3) which provides for jurisdiction if "rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

This exception does not apply as Antares has failed to establish that the NAA engages in any commercial activity in the U.S. Although it is suggested that the NAA may have commercial ties to this country by virtue of the fact that it is an international airport, this bare allegation is insufficient to support a finding of commercial activity. As stated in the Affidavit of W.C. Madueke, the NAA, which operates exclusively in Nigeria, is neither registered nor licensed to do business in the U.S. and in fact conducts no business in the U.S.; it does not own or rent property in the U.S.; and it does not buy or sell goods in the U.S. Accordingly, the expropriation

exception does not apply.[4]

C. Non-Commercial Tort Exception

Finally, Antares claims that the NAA's activities fall under the exception set forth in § 1605(a)(5) which states in pertinent part that foreign sovereigns, or their instrumentalities, are not immune in actions "in which money damages are sought against a foreign state for . . . damage to or loss of property, occurring in the United States and caused by the tortious act or omission of [a] foreign state. . . ." U.S.C. § 1605(a)(5).

It is well-recognized that for the non-commercial tort exception to apply, the entire tort must occur in the U.S. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Parsinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984). In *Frolova*, the Court engaged in a lengthy analysis of the statute's legislative history and concluded that "Congress intended that the tortious act or omission, as well as the injury, occur in the United States." *Frolova*, 761 F.2d at 379. In the present case, as it undisputed that the alleged conversion of the aircraft took place in Nigeria and the subsequent financial loss occurred in the U.S., this exception is clearly unavailable.

III. CONCLUSION

In sum, as the alleged activities of the defendants do not fall under any of the statutory exceptions set forth in 28 U.S.C. §§

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[4] Antares argues that if in fact the deregistration of the aircraft was performed by the FRN, not the NAA, this exception is clearly applicable as it is conceded that the FRN engages in commercial activity in the U.S. Although this prong of the exception may be satisfied, it is obvious that a failure to deregister an aircraft is not a taking or expropriation of property. Thus, even if the deregistration of the aircraft was performed under the authority of the FRN, this exception still cannot be invoked.

1605-1607, the defendants are immune from suit in this Court by virtue of sovereign immunity under the FSIA. Therefore, the defendants' motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction is granted. Accordingly, we need not address the defendants' motion to dismiss on the ground of *forum non conveniens* or the NAA's motion under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction.

SO ORDERED.

Dated: February 26, 1991

/S/ JOHN S. MARTIN, JR.
JOHN S. MARTIN, JR., U.S.D.J.